No. 63

IN THE
Supreme Court of the United States

OCTOBER TERM, 1939

V. L. LETULLE, *Petitioner,*

v.

FRANK SCOFIELD, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF TEXAS, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING

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SUBJECT INDEX

TABLE OF CASES

STATUTES AND MISCELLANEOUS CITATIONS

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Comes now the above named petitioner, V. L. LeTulle, and presents this his petition for rehearing in the above entitled cause, and in support thereof respectfully shows:

Preliminary Statement.

This case arose under the 1928 Revenue Act. The irreconcilable conflict between Regulations 74 of the Treasury Department under that act and the holding of this Honorable Court in this case can best be illustrated by a comparison of the applica-

ble provisions of the regulations with the pertinent language of this Court's opinion, as follows:

Regulations 74	Opinion
Art. 574. Exchanges in connection with corporate reorganizations.— * * If two or more corporations reorganize, for example, by—* * (3) The acquisition by the Y Corporation * * of substantially all of the properties of the X Corporation, * * then no taxable income is received from the transaction by the X Corporation * * if the sole consideration received by the corporation is stock *or* securities of the Y Corporation * *	Where the consideration is wholly in the transferee's bonds, or part cash and part such bonds, we think it cannot be said that the transferor retains any proprietary interest in the enterprise. * * We conclude that the Circuit Court of Appeals was in error in holding that, as respects any of the property transferred to the Water Company, the transaction was other than a sale or exchange upon which gain or loss must be reckoned in accordance with the provisions of the revenue act dealing with the recognition of gain or loss upon a sale or exchange.
Art. 577. Definitions.— * * * As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if "stock and securities".	

are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

The wording of each revenue act and the treasury regulations promulgated thereunder from the 1921 Act to and including the 1932 Act were substantially identical. In view of these facts and of the last two paragraphs of Mr. Justice Roberts' dissenting opinion in *Higgins v. Smith* decided by this Court on January 8, 1940, it is impossible for us to believe that Mr. Justice Roberts in writing the opinion in this case, and this Court in making its decision, had in mind these regulations and the legislative history of these acts.

I.

The uniform interpretation of the 1928 Revenue Act and prior revenue acts by the Treasury Department and by the courts and the repeated re-enactment by Congress of identical provisions after such interpretation, demonstrate that the transfer of the properties by the Irrigation Company to the Water Company for bonds was a tax free reorganization.

The majority of this Court in *Higgins v. Smith*,

decided on January 8, 1940, recognized the force of long continued administrative constructions of a taxing statute, but decided that case on the ground that the government had changed its construction prior to the transaction there involved and held that the change operated validly after that date. Mr. Justice Roberts in his opinion in that case states:

> "I am of opinion that where taxpayers have relied upon a long unvarying series of decisions construing and applying a statute, the only appropriate method to change the rights of the taxpayers is to go to Congress for legislation. In my view, the resort to Congress on the one hand for amendment, and the appeal to the courts on the other, for a reversal of construction, which, if successful, will operate unjustly and retroactively upon those who have acted in reliance upon oft-reiterated judicial decisions, are wholly inconsistent.
>
> "I am of opinion that the courts should not disappoint the well founded expectation of citizens that, until Congress speaks to the contrary, they may, with confidence rely upon the uniform judicial interpretation of a statute. The action taken in this case seems to me to make it impossible for a citizen safely to conduct his affairs in reliance upon any settled body of court decisions."

The transaction here involved occurred on November 4, 1931, and up to and considerably past that time the uniform construction of the applicable revenue acts by the Treasury Department was that, where a corporation acquired all of the stock of another corporation or substantially all of its properties in exchange for bonds, the transaction was a

reorganization. There is nothing in any of the revenue acts prior to that of 1934 requiring the selling corporation to retain a "proprietary" interest through stock ownership in the purchasing corporation, and it was only in the 1934 Act that any such stock ownership provision was inserted.

The legislative history and the regulations and rulings of the Treasury Department beginning with the Revenue Act of 1921 down through and including that of 1932 were consistent that this transaction was a reorganization.

For the ready reference of the Court, we include in the appendices to this petition copies of the applicable Revenue Acts of 1921, 1924, 1926, 1928, 1932 and 1934[1] and the corresponding Regulations 62, 65, 69, 74 and 77, the regulations under the 1934 Act being omitted as that statute introduced a material change from the prior acts.

The Revenue Act of 1918[2], had very loose provisions concerning reorganizations. That section read as follows:

> "Section 202 (b). When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or secur-

[1] 42 Stat. c. 136, p. 227, 229, 230; 43 Stat. c. 234, p. 253, 256-258; 44 Stat. c. 27, p. 9, 12-14; 45 Stat. c. 852, p. 791, 816-818; 47 Stat. c. 209, p. 169, 196-198; 48 Stat. c. 277, p. 704, 705.

[2] Section 202 (b), 40 Stat. c. 18, p. 1057, 1060.

ities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged.

"When in the case of any such reorganization, merger or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost (or if acquired prior to March 1, 1913, the fair market value as of that date) of the stock or securities exchanged."

These loose provisions proved unsatisfactory and substantial changes were made when the 1921 Act was passed. That act in Section 202 (c)[3] provided in part:

"but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized—

* * *

"(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word 'reorganization', as used in this paragraph, includes a merger or consolidation (including the

[3] 42 Stat. c. 136, p. 230.

acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation, (however effected)."

Here was the first attempt to state what the word "reorganization" should include, and the words used in parenthesis

"(including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation)",

were there introduced for the first time, and were re-enacted in the Revenue Acts of 1924, 1926, 1928 and 1932[4] without change. Regulations 62 under the Revenue Act of 1921 provided in part as follows:

"ART. 1566. Exchange of property which results in no gain or loss.— * *

"(b) * * Under this paragraph it makes no difference whether the stock or securities received are or are not of a like kind or class. * * Where two or more corporations unite their properties, by * * (2) the sale of its property by B to A, * * or (6) the ac-

[4]Sec. 203 (h), 1924 Act, 43 Stat., c. 234, p. 257; Sec. 203 (h), 1926 Act, 44 Stat. c. 27, p. 14; Sec. 112 (i), 1928 Act, 45 Stat. c. 852, p. 818; Sec. 112 (i), 1932 Act, 47 Stat. c. 209, p. 198.

quisition by A * * of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock *or* securities of corporations A or B or any corporation a party to or resulting from the reorganization."

Under the foregoing plain and unequivocal provisions, if Corporation B sold substantially all of its properties to Corporation A for stock *or* bonds of Corporation A, the Treasury Department stated that no taxable income would be received by Corporation A.

The Revenue Act of 1924[5], in so far as the provisions involved in this case are concerned, was substantially the same as that of 1921 except in one respect. The Act of 1921 expressly provided that a person receiving stock or securities in a reorganization would have neither taxable gain nor loss but did not expressly make the same provision in reference to a corporation, although in Regulations 62 the Treasury Department ruled that a corporation transferring its properties for stock or securities would receive no taxable income. In the report of the Committee on Ways and Means to the House of Representatives[6], on the revenue bill of 1924, this omission in the law was pointed out. That report stated in part as follows (p. 13):

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[5]Secs. 203 (b) (3) and 203 (h), 43 Stat. p. 256, 257.

[6]Ways and Means Committee Report No. 179, 68th Congress, 1st Sess., p. 13.

"(2) Paragraph (3) provides that no gain or loss is recognized if a corporation, a party to a reorganization exchanges property for stock or securities in another corporation, a party to the reorganization. There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The statute should contain a definite rule on this question."

There was inserted in the 1924 Act as Section 203 (b) (3) the following provision:

"No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."

That is the same identical language as is found in Section 203 (b) (3) of the Revenue Act of 1926[7] and Section 112 (b) (4) of the 1928 and 1932 Acts[8].

In the same report of the House Committee on Ways and Means on the 1924 Act, the Committee stated (p. 14):

"It should be noted that in paragraphs (b) and (c) of this section, as well as in other provisions of the proposed bill, the conjunction 'or' is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of paragraph (2) are complied with if 'stock and securities' are received in exchange as well

[7] 44 Stat. p. 12.

[8] 45 Stat. p. 816; 47 Stat. p. 196.

as if 'stock or securities' are received, and if securities in the same corporation together with securities in another corporation a party to the reorganization, or in other corporations parties to the reorganization, are received in the exchange."

As will be seen, the Treasury Department immediately in its regulations under the 1924 Act incorporated exactly the same wording as that last above quoted from the report of the Committee on Ways and Means, and carried the same forward into the regulations under the subsequent acts.

Regulations 65 under the Revenue Act of 1924 provided in part:

"ART. 1574. Exchanges in connection with corporate reorganizations.—* * If two or more corporations reorganize, for example, by either * * (2) the sale of its property by B to A, * * or (6) the acquisition by A * * of substantially all of the properties of B, * * then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock *or* securities of corporation A or B; * * *."

"ART. 1577. Definitions. * *

"As used in this section, as well as in other provisions of the statute, the conjunction 'or' is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 1572 are complied with if 'stock and securities' are received in exchange as well as if 'stock *or* securities' are received, and if securities in the same corporation, together with securities in another corporation a party

to the reorganization, or in other corporations parties to the reorganization, are received in exchange."

There is only one explanation for these words found in the report of the committee and in the last above quoted paragraph of the regulations. Both Congress and the Treasury Department realized that the word "or" meant "or" and that either stock *or* securities might be received in a reorganization, but they wanted it to be definitely understood that, if Corporation A in a reorganization received stock and would receive no taxable gain and if Corporation B received bonds and would receive no taxable gain, then, if Corporation C received both stock *and* bonds, Corporation C would likewise receive no taxable income. In other words, realizing that the word "or" meant "or", they wanted it clearly understood that it also meant "and".

The Revenue Act of 1926[9] was identical with that of 1924, in so far as here applicable.

Again in Regulations 69 under the 1926 act the Treasury Department provided:

"ART. 1574. Exchanges in connection with corporate reorganizations. * * * If two or more corporations reorganize, for example by * * *

"(2) The sale of its property by B to A, * * *

"(6) The acquisition by A * * * of substantially all of the properties of B, * * *

[9]Secs. 203 (b) (3) and 203 (h), 44 Stat. p. 12, 14.

then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock *or* securities of corporation A or B;

* * *

"ART. 1577. Definitions.—* *

"As used in Section 203, as well as in other provisions of the statute, the conjunction 'or' is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of Article 1574 are complied with if 'stock and securities' are received in exchange as well as if 'stock *or* securities' are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange."

In addition to these interpretations in the regulations, the Treasury Department published in 1926, Income Tax Unit Ruling 2306[10] under the 1926 Revenue Act. There the M Corporation transferred the stock of the O Company to the P Company solely for bonds of P Company. The Department held that the transaction

"was a reorganization transaction whereby stock in a corporation a party to such reorganization (O Company) was exchanged *solely* for bonds of another corporation a party to the reorganization (P Company). On such a transaction no gain or loss is recognized, the basis of the bonds to the M Corporation being the cost or other basis of the O Company stock to the M Corporation."

[10] C. B. V-2, p. 11.

The 1926 Act provided that a reorganization included the acquisition by one corporation of all the stock of another corporation or of substantially all of its properties, and the above illustration, although involving stock, applies equally to one involving properties. In the above illustration the selling company (M) exchanged the stock of O Company *solely* for bonds of the P Company and the Treasury Department held that this was a tax free reorganization.

The Revenue Act of 1928[11], which is the act under which this case arises, was the same as that of 1926. Again, Regulations 74 under that act provided in part:

> "ART. 574. Exchanges in connection with corporate reorganizations.— * * If two or more corporations reorganize, for example, by—
> * * *
>
> "(3) The acquisition by the Y Corporation * * of substantially all of the properties of the X Corporation, * *
>
> then no taxable income is received from the transaction by the X Corporation * * if the sole consideration received by the corporation is stock *or* securities of the Y Corporation;
> * * *
>
> "ART. 577. * *
>
> "As used in Section 112, as well as in other provisions of the Act, the conjunction 'or' is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of Article 574 are complied with if 'stock and securities'

[11]Secs. 112 (b) (4) and 112 (i), 45 Stat. p. 816, 818.

> are received in exchange as well as if 'stock or securities' are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange."

Those regulations, which were the ones under which this transaction in November, 1931, was made, when applied to this case, read:

> "If two or more corporations reorganize, for example, by—
>
> * * *
>
> "(3) The acquisition by the Y Corporation (Gulf Coast Water Company) * * of substantially all of the properties of the X Corporation (Gulf Coast Irrigation Company) * *
>
> then no taxable income is received from the transaction by the X Corporation (Gulf Coast Irrigation Company) * * if the sole consideration received by the corporation (Gulf Coast Irrigation Company) is stock *or* securities (bonds) of the Y Corporation (Gulf Coast Water Company)."

It will be noted that this occurs in Article 574 of these regulations. In Article 577, it was provided:

> "For example, the provisions of Article 574 are complied with if 'stock and securities' are received in exchange as well as if 'stock or securities' are received."

Under the express wording of those regulations the transfer by the Irrigation Company of its prop-

erties to the Water Company for bonds of the Water Company gave rise to no taxable income on the part of the Irrigation Company.

In 1931, the year in which the reorganization in this case took effect, it was universally considered that an exchange of properties for bonds was a tax free reorganization. One of the most widely distributed tax services is the Federal Tax Service of Commerce Clearing House, Inc. That service on July 22, 1931[12], gave the following illustration and discussion:

> "Problem: A owned 51 per cent or more of the issued voting and nonvoting, if any, stock of X Co. In 1927, he transferred all his said stock in X Co. to corporation, Y Co., receiving therefor 24 per cent of the agreed sale price in cash, and balance in bonds issued by Y Co., maturing serially over a period of 8 years. Let us assume, for illustration purposes, that these shares in X Co. cost A $100,000, were sold for $200,000 to Y Co., represented by $48,000 cash, and $152,000 in bonds, issued by Y Co., worth their par value of $152,000. What is A's income tax liability?
>
> "Answer: This transaction classifies as a 'reorganization' under Section 112 (i)(1)(A), 1928 Act, and corresponding Section 203 (h) (1) (A) of the 1926 Act (311 CCH par. 715). See also par. 718.13. It is the acquisition by one corporation (by Y Co.) of at least a majority (51 per cent) of the voting stock, and at least a majority (51 per cent) of the total number of shares of all other issued classes of stock in another corporation (in X Co.). X Co. and Y Co. are each 'a party to the re-

[12]C. C. H. Vol. 312, par. 4034, Illustrative Cases—Bulletin F.

organization', as that term is defined in Section 112 (i) (2), 1928 Act, and 203 (h) (2) of 1926 Act (311 CCH par. 717 and 718.14).

"Consequently, the amount of the 'recognized' gain of A from said 1927 reorganization transaction is to be determined under applicable Sections 203 (b) (2), 1926 Act (same as in 112 (b) (3), 1928 Act) for which see 311 CCH par. 702 and 702.03; and under the further applicable Section 203 (d) (1), 1926 Act, same as in 112 (c) (1), 1928 Act (311 CCH par. 706, and 718.06).

"Under those sections the $100,000 gain of A is then 'recognized', as taxable gain, but in a sum not in excess of the $48,000 cash item received by him.

"The bonds in Y Co. classify as 'securities', as that word is used in Section 203, 1926 Act, and 112 of 1928 Act, so as in 203 (b) (2), 1926 Act, and 112 (b) (3) of 1928 Act. See I. T. 2301; G. C. M. 3291; S. M. 2723; and I. T. 2258; reported at 311 CCH par. 743.13, 743.216, 784.05, and 730.04; also court decision in Williams v. Com., 44 Fed. (2d) 467, at par. 697.222; and First National Bank of Champlain v. Com., 21 BTA 415, reported at 1930 CCH par. 7902."

The 1932 Act[13] and Regulations 77 thereunder were substantially identical with those under the 1928 Act and will not be repeated.

The 1934 Revenue Act, however, changed the definition of reorganization so as to require stock to be obtained by the selling company. If this Court were construing in this case the 1934 Revenue

[13] Secs. 112 (b) (4) and 112 (i), 47 Stat. p. 196, 198.

Act[14], its holding might be correct. We illustrate the change that was made in the 1934 Act by comparing it with the 1928 Act:

1928 Act	1934 Act
Section 112 (i) (1). The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation).	Section 112 (g) (1). The term "reorganization" means (A) a *statutory* merger or consolidation, or (B) the acquisition by one corporation *in exchange solely for all or a part of its voting stock:* of at least *80 per centum of* the voting stock and at least *80 per centum* of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation.

As shown by the reports of the Senate Committee on Finance[15] and of the House Committee on Ways and Means[16], the House proposed to eliminate the part in parenthesis in Section 112 (i) defining a reorganization, which part included the acquisition of a majority of the stock or substantially all the properties of another corporation, and thus limit

[14]Sec. 112 (g), 48 Stat. c. 277, p. 705.

[15]Senate Finance Committee Report No. 558, 73rd Congress, 2nd Sess. p. 16.

[16]Ways and Means Committee Report No. 704, 73rd Congress, 2nd Sess.

reorganizations to (1) statutory mergers and consolidations; (2) transfers to a controlled corporation, "control" being defined as 80 per cent ownership; and (3) changes in the capital structure or form of organization. The Senate did not concur in such a limitation because many states had no laws dealing with mergers or consolidations, and therefore inserted clause (B) in Section 112 (g) (1) of the 1934 Act, above quoted. There is the first time that the Revenue Acts require stock to be received, and Congress thereby, particularly in view of the legislative history of the prior acts, clearly shows that under the prior acts it did not intend to require any "proprietary" interest to be essential through stock ownership in the acquiring corporation.

The regulations and rulings by the Treasury Department under the prior acts were directly in accord with the policy of Congress. If the regulations were clearly wrong and in conflict with the congressional policy, then this Honorable Court might be justified in ignoring them and interpreting the statute to carry out the policy of Congress. On the other hand, the regulations were justified under the statute and were in accord with congressional policy. That policy has been, in a case like this where the gain is represented only by paper profits evidenced by bonds that may or may not be paid in whole or in part, to postpone the levy of an income tax on the gain until the taxpayer actually receives cash for the bonds or securities.

In the report of the Committee on Ways and

Means to the House under the 1924 Act, *supra*, the committee stated (p. 13):

> "Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation."

The same statement in identical words was made to the Senate by the Committee on Finance.

Treasury Regulations 65 under the 1924 Act, Article 1574, set out this policy:

> "Since corporate reorganizations which result only in a change in form and which do not substantially affect the property interests either of the shareholders or of the corporations may be required or may be made desirable by business conditions, State laws, or other causes, the statute provides that no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization nor to the corporations from the exchange of property made in connection with the reorganization.
>
> "In conformity with the principle of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides further that the stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss from its subsequent sale as the stock surrendered by them

and that the assets acquired by a corporation a party to the reorganization shall have the same basis for the purposes of depreciation, depletion, and the determination of gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See Arts. 1596-1598.) The exchanges made by both the shareholders and the corporations in connection with a reorganization are ignored and both are treated thereafter as if the reorganization had not occurred."

In conformity with this policy, there is as much reason for exempting from immediate taxation a gain represented by bonds as a gain represented by stock. In each case no cash is received, and the reorganization statute was written in order that trades similar to the one here under consideration might be made. Ultimately the Government will receive income taxes on account of this trade, for, as the bonds are paid off, the petitioner will pay taxes on the gain actually realized, this gain being the difference between the amount paid on the bonds and the cost of his stock in the Irrigation Company, which became his basis for these bonds.

This congressional policy of not taxing paper gains on reorganizations until the paper gains have been converted into cash was in direct accord with congressional policy in allowing other parties, making sales of property for a small amount of cash and deferred notes, to report their profit on an installment basis and to pay an income tax on the profit realized only as and when the installment

notes or obligations were actually paid and the seller received cash[17].

We will discuss the attitude of the Government in connection with this question. As heretofore pointed out, the 1932 Act (which was passed after the transaction in this case had been closed) reenacted provisions of the 1928 Act and the Treasury Department's regulations under that act repeated the regulations under the 1928 Act, reaffirming that this transaction was tax free. It was generally accepted by the courts that this question was finally settled by this Court in *Helvering v. Watts*[18], decided December 16, 1935, and the other tax cases decided on that day[19]. In the *Watts case* there was an exchange of stock in Corporation A for stock in Corporation B and bonds in another corporation a party to the reorganization. The Government contended that the bonds were other property and were not securities within the meaning of the act. The Circuit Court of Appeals[20], in holding against the Government, went into a detailed history of these acts and concluded that, under the continued construction of the act and the regulations of the Treasury Department, the bonds were securities and the transaction was a tax free reorganization. All of

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[17]See Sec. 44 (b) Revenue Act of 1928, 45 Stat. p. 805, and corresponding sections of other revenue acts.

[18]296 U. S. 387.

[19]*John A. Nelson & Co. v. Helvering*, 296 U. S. 374; *Helvering v. Minnesota Tea Co.*, 296 U. S. 378.

[20]*Watts v. Com.*, 75 F. 2d 981.

the courts and the Board of Tax Appeals since that time have assumed (and we submit correctly) that those decisions foreclosed this question.

It is highly significant that the *Watts case* was decided by this Court on December 16, 1935, and just prior thereto on December 5, 1935, the Ninth Circuit Court of Appeals decided the *Lilienthal case*[21]. In that case a corporation acquired a majority of the stock of another corporation in exchange for cash and its ten-year bonds. The Government in that case for the first time raised the point that these bonds were not securities. The Circuit Court of Appeals held against the Government *but the Government did not apply to this Honorable Court for writ of certiorari.* If it were convinced of the soundness of its position, it could have had this Court immediately settle this whole question right there in the *Lilienthal case.* It is also highly significant that in the present case, where the Circuit Court of Appeals held that this was a tax free reorganization, the Government did not seek a review of that question by this Honorable Court but in fact opposed the application of petitioner for a writ.

It is interesting to note the attitude of the Government in the converse situation of where bonds are exchanged for stock.

In Solicitor's Memorandum 2723[22], an exchange of bonds for stock and bonds was held a reorgani-

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[21] *Lilienthal v. Commissioner*, 80 F. 2d 411.

[22] C. B. III-2, p. 26.

zation. In I. T. 2071[23], a transfer of bonds for stock was held to result in no recognizable loss. In I. T. 2238[24], an exchange of bonds for preferred stock was a reorganization. In *First National Bank v. Commissioner*[25], holders of bonds in one corporation exchanged them for preferred stock in another corporation, and the Government's contention that no loss should be recognized, as this was a reorganization, was sustained.

The *Pinellas and Cortland Specialty Company cases*[26] did not involve the point, as the notes in those cases were of such short term that they were held to be the equivalent of cash and were not securities.

In *Worcester Salt Company v. Commissioner*[27], there was a sale of assets by a subsidiary to its parent corporation for bonds. The point decided by the Board was that this was not governed by the reorganization provisions because it was a transaction occurring between affiliated companies during the period of affiliation and was controlled by the parts of the act dealing with affiliated companies. The decision was affirmed by the Circuit Court of Appeals which court explained in *L. &*

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[23] C. B. III-2, p. 34.

[24] C. B. V-1, p. 10.

[25] 21 B. T. A. 415.

[26] *Pinellas Ice & Cold Storage Co. v. Com.*, 287 U. S. 462; *Cortland Specialty Co. v. Com.*, 60 F. 2d 937.

[27] 29 B. T. A. 526, 75 F. 2d 251.

E. Stirn, Inc. v. Commissioner[28], that it had placed its decision in that case on the ground that it construed the bonds involved in that case not to be "securities".

In 1935, long after petitioner's transaction had been closed and after the Revenue Act of 1934 had introduced the new provisions concerning transfer of assets solely for stock, but prior to the decisions of this Court in December, 1935, the Board in *McNab v. Commissioner*[29], held with the Government that, where there was an exchange of stock in one corporation for cash and bonds, there was no reorganization, but that contention was made by the Government long after 1931. The taxpayer did not appeal.

In *Newberry Lumber & Chemical Company v. Commissioner*[30], the Board held that where bondholders of a defunct corporation through a foreclosure sale had the properties transferred to a corporation for stock, this was not a reorganization, but the Circuit Court of Appeals reversed the Board and held that it was a reorganization, and the Commissioner did not appeal to this Court.

In *Kiiselman v. Commissioner*[31], a similar bond foreclosure case under which the bondholders got stock in the new corporation was involved, and the

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[28] 107 F. 2d 390.

[29] 33 B. T. A. 192.

[30] 33 B. T. A. 150 (Oct. 3, 1935), 94 F. 2d 447, (Feb. 11, 1938).

[31] 33 B. T. A. 494 (Nov. 19, 1935).

Board held with the Government that there was no reorganization. This was reversed by the Circuit Court of Appeals[32], and the Government did not appeal (the denial of *certiorari* being on the petition of the taxpayer who appealed in connection with another issue).

In *Burnham v. Commissioner*[33], a taxpayer exchanged unsecured notes for stock and sought to deduct a loss. The government in that case contended that it was a reorganization and the Board and Circuit Court of Appeals sustained the Government's contention. There the Government did not want the taxpayer to get the advantage of a loss deduction.

In *Kaspare Cohn Company, Ltd. v. Commissioner*[34], the Board held against the Government that a transfer of stocks by Corporation A in exchange for cash and bonds of the purchasing corporation was a tax free reorganization. In that case the Government was seeking to levy a tax on the gain made in the transaction.

In *Segall v. Commissioner*[35], the Board held that the transfer by one corporation of its assets to a second corporation for cash and debenture notes was a reorganization and no taxable income resulted.

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[32] 89 F. 2d 458, cert. den. 302 U. S. 79.

[33] 33 B. T. A. 147, (Oct. 3, 1935), 86 F. 2d 776, (Dec. 8, 1936) cert. den. 300 U. S. 683 on petition of taxpayer.

[34] 35 B. T. A. 646 (Mar. 11, 1937).

[35] 38 B. T. A. 43, (July 12, 1938).

In *Commissioner v. Freund*[36], the court held that an exchange of stock in one corporation for cash and mortgage bonds of another corporation came within the reorganization provisions, overruling the contention of the Commissioner, and the Government did not appeal.

In *Commissioner v. Kolb*[37], the taxpayer exchanged stock and bonds in one corporation for stock in another, and the court held against the Commissioner that this was a reorganization, and the Government did not appeal.

In *White v. United States*[38], the holders of stock in several corporations that were merged into another corporation received for their stock bonds of the latter corporation. The Court of Claims held this was a non-taxable reorganization, and the United States has not appealed.

In *Tyng v. Commissioner*[39], the owners of stock in one corporation transferred the same to another corporation for cash and bonds and both the Board of Tax Appeals and the Circuit Court of Appeals held that this was a non-taxable reorganization. Involved in the same transaction was William Buchsbaum, whose case was decided in the same opinions. At last the Government appealed in this type of case, but it is significant that the Govern-

[36] 98 F. 2d 201 (June 22, 1938).

[37] 100 F. 2d 920 (Nov. 30, 1938).

[38] 22 F. Supp. 821 (Apr. 4, 1938).

[39] 36 B. T. A. 21, 106 F. 2d 55.

ment's applications for *certiorari* in these cases were filed with this Court only on November 16, 1939 (causes Nos. 537 and 538) after the petition for *certiorari* in this *LeTulle case* had been granted and it appeared there was the possibility of this Court acting on this question.

The unanimous acceptance by all the courts of the proposition that no stock need be involved in such reorganizations is well summarized by Justice Hand in the *Tyng case, supra,* as follows:

> "Five different Circuit Courts of Appeal, besides our own, and the Court of Claims as well, have decided that the receipt of 'securities' results in the retention of a continuity of interest necessary for a reorganization. We reached this conclusion in Watts v. Commissioner, 2 Cir., 75 F. (2) 981, afterwards affirmed by the Supreme Court sub nomine Helvering v. Watts, *supra.* The following decisions are to the same effect: Scofield v. LeTulle, 5 Cir., 103 F. 2d. 20, 22; Commissioner v. Freund, 3 Cir., 98 F. 2d. 201, 205; Commissioner v. Newberry L. and C. Co., 6 Cir., 94 F. 2d. 447, 449; Commissioner v. Kitselman, 7 Cir. 89 F. 2d. 458, 460; Burnham v. Commissioner, 7 Cir., 86 F. 2d. 776; *certiorari* denied 300 U. S. 683, 57 S. Ct. 753, 81 L. Ed. 886: Lilienthal v. Commissioner, 9 Cir., 80 F. 2d. 411; White v. United States, Ct. Cls., 22 F. Supp. 821; 829."

In this case we have the plain and explicit regulations of the Treasury Department under the Revenue Acts of 1921, 1924, 1926, 1928 and 1932 that where a corporation transfers its properties for bonds of another corporation, this is a reorgani-

zation. While these regulations were in effect, Congress re-enacted the same identical provisions concerning reorganizations in the 1921, 1924, 1926, 1928 and 1932 Acts. Under the well recognized principles of statutory construction, Congress adopted these regulatory constructions of its statutes.

Mr. Justice Stone in the *Murphy Oil Company case*[40] states the rule:

> "The method of computation provided by the amended regulation must be taken to have received the approval of Congress, for, as already noted, the provisions of Article 215 (a), as amended, have been continued in the Treasury Regulations since 1926 and those of Section 234 (a) (9) of the Revenue Act of 1918 have been reenacted without substantial change in the Revenue Acts of 1928 and 1932."

Mr. Justice Stone in *United States v. Dakota-Montana Oil Co.*[41], stated:

> "Thus the Acts of 1918, 1921 and 1924 were consistently construed by the regulations to permit a depletion, but not a depreciation, allowance for the costs of development work and drilling, which were treated for this purpose either as a part of the cost or an addition to the discovery value of the oil in the ground. The administrative construction must be deemed to have received legislative approval by the reenactment of the statutory provision, without material change. Murphy Oil Co. v.

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[40] *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 307.

[41] 288 U. S. 459, 466.

Burnet, 287 U. S. 299; Brewster v. Gage, 280 U. S. 327, 337."

Mr. Justice Cardozo reiterated the rule[42]:

"This regulation was in substance readopted in the regulations already referred to under the Act of 1921. There are verbal variations, but not of such a nature as to suggest a change of meaning. The like is true of a Treasury Decision issued under the Revenue Act of 1926 (44 Stat. 9; T. D. 3843). All these regulations have had the tacit assent and confirmation of the lawmakers. Successive revenue statutes have been enacted without substantial change in the applicable sections. Congress seemingly has been satisfied with the Decisions of the Treasury and with the interpretation of its own meaning implicit in them. National Lead Co. v. United States, 252 U. S. 140, 146; McCaughn v. Hershey Chocolate Co., 283 U. S. 488, 492, 493; Costanzo v. Tillinghast, 287 U. S. 341, 345; Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315."

The Majority of this Court, speaking through Mr. Justice Stone in a very recent case[43] involving a situation exactly parallel to that in this case applied the rule as follows:

"This regulation is a clear recognition that Sections 115 and 101, when read with the other sections of the Act, are interdependent and require stockholders' gains upon liquidation to be taxed as are the corresponding gains on sales of property. The regulation, in identical

[42] *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 179.

[43] *White v. United States*, 305 U. S. 281, 290.

form, first appeared in Article 1545 of Regulations 65 and 69, applicable to Sections 201 (c) and 208 of the Revenue Acts of 1924 and 1926, corresponding to Sections 115 (c) and 101 of the 1928 Act, and was continued in Article 625 of Regulations 77 with relation to the corresponding Sections, 115 (c) and 101, of the 1932 Act.

"The repeated reenactment of Sections 101 and 115 (c), as they appear in the Revenue Acts of 1924, 1928, and 1932, is upon accepted principles a Congressional adoption of the regulation as correctly interpreting those sections and is Congressional recognition that Sections 101 and 115 (c) are to be read together in order to ascertain the method by which gains and losses upon liquidation are to be taxed."

We respectfully submit that this Honorable Court erred in writing into the statute the continuing "proprietary interest" requirement, and the transfer of the properties from the Irrigation Company to the Water Company for long term bonds was a tax free reorganization.

II.

The question as to whether the transfer of the properties for bonds was a tax free reorganization was not properly before this Court.

The only issue made between the parties in the District Court and the Circuit Court of Appeals was whether the transfer of the properties by the Irrigation Company to the Water Company for long term bonds was a tax free reorganization. That

issue was determined against the respondent and he did not petition for a writ of *certiorari*.

The Circuit Court of Appeals then held[44] that, as to part of the properties only, they could not be considered as having been transferred to the Irrigation Company but should be treated as sold directly by petitioner to the Water Company and reversed the case as to those particular properties.

The Circuit Court of Appeals decided the *issue* of reorganization against the respondent, but yet that *issue* has now been decided by this Court in favor of the respondent without any appeal on his part. While it is true that a non-appealing respondent may urge different reasons from those of the court below on which he sustained the judgment, yet he may not disturb that judgment and the holding of the court, as Mr. Justice Brandeis said in the *Pfeiffer case*[45]:

> "While a decision below may be sustained, without cross-appeal, although it was rested upon a wrong ground, see Helvering v. Gowran, supra, an appellee cannot without a cross-appeal attack a judgment entered below."

That is exactly what the respondent in this case has done, attacked the holding of the Circuit Court of Appeals that there was a tax free reorganization.

Under the record as the case now stands, it would

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[44]Record, p. 215.

[45]*Helvering v. Pfeiffer*, 302 U. S. 247.

go back to the District Court with the anomalous situation of the District Court being directed to treat the transfer by the Irrigation Company to the Water Company of part of the properties as a tax free reorganization and to treat the same transfer of the other properties as not a tax free reorganization.

It seems to us that where the definite and square issue has been determined by the court below against the respondent on the reorganization question, then this Court should pass only upon the question as to whether or not the petitioner's so-called individual properties should be included in the reorganization. In other words, if the Circuit Court of Appeals was in error, as we submit it was, in its holding as to these individual properties, then, the issue as to the reorganization having been decided against the respondent, the judgment of the District Court must be affirmed.

III.

The Circuit Court of Appeals erred in reversing the judgment of the District Court.

We here refer to, as if fully set out, all of the statements and arguments presented in our petition and briefs as to why the Circuit Court of Appeals erred. We will not repeat them as this Honorable Court has not discussed them in any way in its opinion.

Repeatedly in the respondent's brief and in the oral submission of this case it was stated that there

was no evidence in the record that petitioner's individual properties had been conveyed to the Irrigation Company. Also the Circuit Court of Appeals in its opinion states[46]:

> "On Nov. 7, 1931, a meeting of the stockholders of the Irrigation Company was held at which the capital stock of the Company was increased from $100,000 to $266,000. The entire increase was thereupon subscribed for by LeTulle, and paid for in property conveyed to the Company at a price of $166,000. The stockholders' meeting then ratifed the contract of Nov. 4, 1931, and authorized the conveyance of all its properties and business accordingly. The evidence thus plainly shows that a large part of the property conveyed under the contract of Nov. 4, 1931, was not at that date owned by the Irrigation Company but by LeTulle, and that he conveyed it to his Company by the device above stated in order to transfer it to the purchaser along with the property of the Irrigation Company."

From that statement it would *seem* that the Irrigation Company on November 4, 1931, owned $100,000 of property and Mr. Le Tulle by the so-called "device" passed into the Company $166,000 of additional property or, in other words, the so-called individual properties amounted to approximately one and two-thirds times the other properties owned by the Irrigation Company. We cannot help but feel that this seeming large excess of the so-called individual properties over the Company's properties consciously or unconsciously had a material

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[46]Record, p. 215.

effect in the decision of this case by this Court and the Circuit Court of Appeals.

We realize that the record as printed does not show the facts in reference to this, but we quote below from the original letters from the Government addressed to Mr. and Mrs. LeTulle which were offered and admitted in evidence on the trial of this case.

As will be seen from the record[47], these letters from the Government were introduced and admitted in evidence, but they were not included in the printed record as no controversy of this nature had arisen at the time the appeal was taken. The record shows at the bottom of page 49 that the commissioner conceded that the cost to the Irrigation Company of the assets that it transferred to the Water Company was at least $398,875.96. The facts were that the $166,000.00 of stock increase on November 4, 1931, was paid by petitioner as follows:

Cancellation of account payable to him by the Irrigation Company	$57,578.04
Notes receivable transferred by him to the Company	33,421.96
Canals, etc.	75,000.00
Total	$166,000.00

In the determination of the individual taxes of Mr. and Mrs. LeTulle there was a controversy between petitioner and the Government as to the cost to him of the 1,660 shares. The Government contended that the amount owing by the Irrigation

[47]Record, pp. 48, 51.

Company to him was $36,462.09 instead of $57,578.04 and therefore the total cost to him of the stock was $129,537.91.

In the letter of January 5, 1934, from the Treasury Department addressed to the petitioner, which was plaintiff's Exhibit No. 17, copy of which the Government has in its file, this matter of the payment of the 1,660 shares is set forth in detail as follows:

"Cost to V. L. LeTulle of 1,660 shares of stock of Gulf Coast Irrigation Company:

"Increase of capital stock of Gulf Coast Irrigation Company issued to V. L. LeTulle for the following:

Account Payable (per books of Gulf Coast Irrigation Co.)	$57,578.04
Notes Receivable	33,421.96
Canals, etc.	75,000.00
Total	$166,000.00

"It has been found, however, that the account payable of $57,578.04 was overstated by an amount of $36,462.09. There follows a computation showing such difference:"

(There then followed a detailed computation unnecessary to repeat here and then the letter stated the final determination of that cost as follows:)

"Cost of 1,660 shares of stock as corrected:

Account Payable as corrected from Gulf Coast Irrigation Co.	$21,115.95
Notes Receivable	33,421.96
Canals, etc.	75,000.00
Total cost	$129,537.91"

In the letter from the Treasury Department of May 14, 1934, addressed to Mr. V. L. LeTulle, which was plaintiff's Exhibit No. 11, the Government in computing the cost to the Irrigation Company of the LeTulle properties carried this cost at $75,000.00 on the following line:

"Right of way, etc. ..... $75,000.00"

In the letter from the Treasury Department of May 19, 1934, to Mr. LeTulle, which was plaintiff's Exhibit No. 15, the cost of the 1,660 shares is set forth as follows:

"Cost 1,660 shares ..... $129,537.91"

In this case plaintiff contended, as shown by his petition in the record at page 19, that the 1,660 shares cost the full $166,000.00 as follows:

150 Shares	$ 15,000.00
1510 Shares	151,000.00

The District Court, however, in its findings of fact[48] found with the Government that the 1,660 shares cost only $129,537.91.

The facts set forth in the above referred to exhibits are uncontradicted and, if this issue had been in this case at any time, those exhibits would have been included in the record. The issue was never at any time raised. For example, the respondent, in his requests for special findings of fact and conclusions of law[49], made no request whatsoever that the District Court make any finding in reference to these individual properties.

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[48] Record, p. 147.

[49] Record, pp. 140-144.

As above shown, the cost to the Irrigation Company of all the properties transferred to the Water Company was $398,875.96, the cost to it of these individual properties being $75,000.00. On the basis of comparative cost, these individual properties amounted to only slightly more than 18 per cent of the total properties transferred. In fact, as could have been shown on the trial of this case if this issue had been raised, these so-called individual properties on a valuation basis at the time of the transaction were at the most not more than 10 per cent of the total properties. The Irrigation Company had been in existence for many years and had an extensive irrigation system with expensive pumping plants, all of which were located on its own properties. These individual properties consisted of rights of way for canals which were merely extensions of the existing system of the Irrigation Company, and were utterly valueless without being connected with the Irrigation Company's properties. They had been operated right along with the Company's properties without any distinction as to their legal ownership, and, being worthless unless connected with the main irrigation system, they were simply included in the transaction.

Conclusion.

We respectfully request this Honorable Court to grant this petition for rehearing and reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court. If this Honorable

Court has any doubt as to the correctness of our position, then we pray the opportunity for a reargument of the case.

In connection with our request for reargument, we respectfully call the attention of this Court to certain facts. In the District Court and Circuit Court of Appeals the entire argument on both sides was devoted to the one question as to whether the transfer of the properties for bonds was a tax free reorganization, and both the District Court and Circuit Court of Appeals held with the taxpayer on that point. The Circuit Court of Appeals then reversed the case on a point that had never been mentioned or argued in that court. Upon the presentation of the case in this Court, practically the entire argument was devoted to a consideration as to whether the Circuit Court of Appeals' action in reversing the case was correct with only incidental reference to the point upon which this Court has decided the case, contrary to the lower courts. The result has been that the petitioner lost in the Circuit Court of Appeals on a point that was never argued, and now in this Court on a point decided in its favor by the lower courts and only incidentally touched upon by each side in the argument before this Honorable Court.

Respectfully submitted,

W. E. DAVANT,
HOMER L. BRUCE,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

I, Homer L. Bruce, attorney for the above named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

HOMER L. BRUCE,
Attorney for Petitioner.

APPENDIX NO. 1

REVENUE ACT OF 1921

(42 Stat., C. 136, p. 227, 229, 230)

BASIS FOR DETERMINING GAIN OR LOSS.

SEC. 202. * * *

(c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value;

but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized—

* * *

(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word "reorganization," as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation, (however effected); or

(3) When (A) a person transfers any property, real, personal or mixed, to a corporation, and immediately after the transfer is in control of such corporation, or

(B) two or more persons transfer any such property to a corporation, and immediately after the transfer are in control of such corporation, and the amounts of stock, securities, or both, received by such persons are in substantially the same proportion as their interests in the property before such transfer.

For the purposes of this paragraph, a person is, or two or more persons are, "in control" of a corporation when owning at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

APPENDIX NO. 2

REGULATIONS 62
UNDER
REVENUE ACT OF 1921

ART. 1566. *Exchange of property which results in no gain or loss.*—Where property is exchanged for other property, even if the property received in exchange has a readily realizable market value, no gain or loss is recognized:

* * * * * * *

(b) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word "reorganization" as used in this paragraph includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the outstanding voting

stock and at least a majority of the total number of outstanding shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation, however effected. *Under this paragraph it makes no difference whether the stock or securities received are or are not of a like kind or class.* So long as the property received in the reorganization consists of stock or securities within the usual meaning and acceptation of these terms, no gain or loss is recognized. *Where two or more corporations unite their properties, by either* (1) the dissolution of corporation B and the sale of its assets to corporation A, or *(2) the sale of its property by B to A,* or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, *or (6) the acquisition by A* of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or *of substantially all of the properties of B, no taxable income is received from the transaction by A or B, or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock* **OR** *securities of corporations A or B or any corporation a party to or resulting from the reorganization.* Where in connection with an internal adjustment of the affairs of a corporation, either by recapitalization or a change in identity, form, or domicile (however effected), a person receives in place of the stock or securities owned by him new stock or secur-

ities of the corporation, no gain or loss is realized. In this connection, see Article 1568.

APPENDIX NO. 3

REVENUE ACT OF 1924
(43 Stat., C. 234, p. 253, 256-258)
RECOGNITION OF GAIN OR LOSS FROM SALES AND EXCHANGES

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under Section 202, shall be recognized, except as hereinafter provided in this section.

(b) * * *

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * *

(h) As used in this section and Sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the

voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a party of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

APPENDIX NO. 4

REGULATIONS 65
UNDER
REVENUE ACT OF 1924

ART. 1574. *Exchanges in connection with corporate reorganization.*—Since corporate reorganizations which result only in a change in form and which do not substantially affect the property interests either of the shareholders or of the corporations may be required or may be made desirable by business conditions, State laws, or other causes.

the statute provides that no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization nor to the corporations from the exchange of property made in connection with the reorganization. *If two or more corporations reorganize, for example, by either* (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) *the sale of its property by B to A,* or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, *or* (6) *the acquisition by A* of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or *of substantially all of the properties of B,* or (7) the transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B, *then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock* **OR** *securities of corporation A or B;* and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B. Furthermore, if the reorganization is accomplished by the transfer by corporation A of a portion of its assets to corporation B in exchange for the stock of corporation B and corporation A distributes as a dividend to its shareholders the stock of corporation B, no taxable income is real-

ized by the shareholders from the receipt of such dividends. (See Art. 1576.)

In conformity with the principle of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides further that the stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss from its subsequent sale as the stock surrendered by them and that the assets acquired by a corporation a party to the reorganization shall have the same basis for the purposes of depreciation, depletion, and determination of gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See Arts. 1596-1598.) The exchanges made by both the shareholders and the corporations in connection with a reorganization are ignored and both are treated thereafter as if the reorganization had not occurred.

Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See Art. 1575.) In such cases the gain to the shareholder is recognized and taxed, but in an amount not exceeding the amount of the money or the other property received in connection with the reorganization. If the money so distributed in connection with the reorganization has the effect of the distribution of a taxable dividend, such gain is

taxed not as a capital gain but as an ordinary dividend subject to the surtax rates. While placing no obstacle in the way of genuine reorganizations, the statute does not allow the use of reorganizations to avoid the tax.

Records in substantial form, showing the basis of the stock or property exchanged, and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received or exchanged.

ART. 1577. DEFINITIONS.—The term "reorganization," as used in Sections 201, 203, and 204 of the statute means (1) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (2) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (3) a recapitalization, or (4) a mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in Sections 201, 203, and 204 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number

of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation within the meaning of Section 203, when owning (1) at least 80 per cent of the voting stock, and (2) at least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in this section, as well as in other provisions of the statute, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of Article 1572 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization, or in other corporations parties to the reorganization, are received in exchange.

APPENDIX NO. 5

REVENUE ACT OF 1926
(44 Stat., C. 27, p. 9, 12-14)

RECOGNITION OF GAIN OR LOSS FROM SALES AND EXCHANGES

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, de-

termined under Section 202, shall be recognized, except as hereinafter provided in this section.

(b) * * *

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * *

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization"

includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

APPENDIX NO. 6

REGULATIONS 69
UNDER
REVENUE ACT OF 1926

ART. 1574. *Exchanges in connection with corporate reorganizations.*—Since corporate reorganizations which result only in a change in form and which do not substantially affect the property interests, either of the shareholders or of the corporations, may be required or may be made desirable by business conditions, State laws, or other causes, the statute provides that no gain or loss shall be recognized if, in pursuance of a plan of reorganization, stock or securities in a corporation a party to a reorganization are exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization, or if, in pursuance of a reorganization plan, a corporation a party to a reorganization exchanges property solely for stock or securities in another corporation a party to the reorganization. *If two or more corporations reorganize, for example by—*

(1) The dissolution of corporation B and the sale of its assets to corporation A,

(2) *The sale of its property by B to A,*

(3) The sale of the stock of B to A,

(4) The merger of B into A,

(5) The consolidation of A and B,

(6) *The acquisition by A* of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or *of substantially all of the properties of B, or*

(7) The transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B,

then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock **OR** *securities of corporation A or B;* and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B.

Furthermore, if the reorganization is accomplished by the transfer by corporation A of a portion of its assets to corporation B in exchange for the stock of corporation B, and corporation A distributes to its shareholders the stock of corporation B, no taxable income is realized by the shareholders from the receipt of such stock. (See Art. 1576.)

In conformity with the principle of ignoring for tax purposes those reorganizations which result merely in a change in form, the statute provides

further that the stock received by the shareholders in connection with the reorganization shall have the same basis for the purpose of determining gain or loss from its subsequent sale as the stock surrendered by them, and that the assets acquired by a corporation a party to the reorganization shall have the same basis for determining depletion, exhaustion, wear and tear, obsolescence, and gain or loss from subsequent sale as they had in the hands of the corporation from which they were acquired. (See Arts. 1596-1598.)

Adequate provision is made in the statute for cases in which income is actually realized by the shareholders in connection with the reorganization through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See Art. 1575.) While placing no obstacle in the way of genuine reorganizations, the statute does not allow the use of reorganizations to avoid the tax.

Records in substantial form, showing the basis of the stock or property exchanged, and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received or exchanged.

ART. 1577. DEFINITIONS.—The term "reorganization," as used in Sections 201, 203, and 204 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of

the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in Sections 201, 203, and 204 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of Section 203, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in Section 203, as well as in other provisions of the statute, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For

example, the provisions of Article 1574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

APPENDIX NO. 7

REVENUE ACT OF 1928

(45 Stat., C. 852, p. 791, 816-818)

SECTION 112. RECOGNITION OF GAIN OR LOSS

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of gain or loss, determined under Section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * *

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) SAME—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) TRANSFER TO CORPORATION CONTROLLED

BY TRANSFEROR.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(c) *Gain from exchanges not solely in kind.*—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsec-

tion (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * *

(i) *Definition of reorganization.*—As used in this section and Sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders of both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

APPENDIX NO. 8

REGULATIONS 74 UNDER REVENUE ACT OF 1928

ART. 574. *Exchanges in Connection With Corporate Reorganizations.*—The Act provides that no gain or loss shall be recognized if, in pursuance of a plan of reorganization, stock or securities in a corporation a party to a reorganization are exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization, or if, in pursuance of a reorganization plan, a corporation a party to a reorganization exchanges property solely for stock or securities in another corporation a party to the reorganization. *If two or more corporations reorganize, for example, by—*

(1) The merger of the X Corporation into the Y Corporation,

(2) The consolidation of the X Corporation and the Z Corporation into the Y Corporation, a new corporation,

(3) *The acquisition by the Y Corporation* of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of the X Corporation or *of substantially all of the properties of the X Corporation, or*

(4) The transfer by the X Corporation of a part of its assets to the Y Corporation where immediately after the transfer the X Corporation or its shareholders or both are in control of the Y Corporation—*then no taxable income is received from the transaction by the X Corporation or the Z Corporation if the sole consideration received by the corporation is stock* **OR** *securities of the Y Corporation;* and no taxable income is received from the transaction by the shareholders of either the X Corporation or the Z Corporation if the sole consideration received by the shareholders is stock or securities of the Y Corporation.

If a reorganization is accomplished by the transfer by the X Corporation of a part of its assets to the Y Corporation in exchange for the stock of the Y Corporation and the X Corporation distributes to its shareholders the stock of the Y Corporation, no gain to the shareholders from the receipt of such stock is recognized. (See Article 576.)

Provision is made in the Act for cases in which

gain to the shareholders is recognized, in connection with a reorganization, through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See Article 575.)

Records in substantial form, showing the basis of the stock or property exchanged and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received in exchange.

ART. 577. *Definitions.*—The term "reorganization," as used in Sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in Sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting

stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of Section 112, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in Section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of Article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

APPENDIX NO. 9

REVENUE ACT OF 1932

(47 Stat., c. 209, p. 169, 196-198)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) GENERAL RULE.—Upon the sale or exchange of property the entire amount of the gain or loss,

determined under Section 111, shall be recognized except as hereinafter provided in this section.

(b) EXCHANGES SOLELY IN KIND.—

* * * * * * *

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) SAME—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * * *

(i) DEFINITION OF REORGANIZATION.—As used in this section and Sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

APPENDIX NO. 10

REGULATIONS 77
UNDER
REVENUE ACT OF 1932

ART. 574. *Exchanges in connection with corporate reorganizations.*—The Act provides that no gain or loss shall be recognized if, in pursuance of a plan of reorganization, stock or securities in a corporation a party to a reorganization are exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization, or if, in pursuance of a reorganization plan, a corporation a party to a reorganization exchanges property solely for stock or securities in another corporation a party to the reorganization. *If two or more corporations reorganize, for example, by—*

(1) The merger of the X Corporation into the Y Corporation,

(2) The consolidation of the X Corporation and the Z Corporation into the Y Corporation, a new corporation,

(3) *The acquisition by the Y Corporation* of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of the X Corporation or *of substantially all of the properties of the X Corporation,* or

(4) The transfer by the X Corporation of a part of its assets to the Y Corporation where immediately after the transfer the X Corporation or its shareholders or both are in control of the Y Corporation—

then no taxable income is received from the transaction by the X Corporation or the Z Corporation if the sole consideration received by the corporations is stock **OR** *securities of the Y Corporation;* and no taxable income is received from the transaction by the shareholders of either the X Corporation or the *Z* Corporation if the sole consideration received by the shareholders is stock or securities of the Y Corporation.

If a reorganization is accomplished by the transfer by the X Corporation of a part of its assets to the Y Corporation in exchange for the stock of the Y Corporation and the X Corporation distributes to its shareholders the stock of the Y Corporation, no gain to the shareholders from the receipt of such stock is recognized. (See Art. 576.)

Provision is made in the Act for cases in which gain to the shareholders is recognized, in connection with a reorganization, through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See Art. 575.)

Records in substantial form, showing the basis of the stock or property exchanged and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received in exchange.

ART. 577. *Definitions.*—The term "reorganization,' as used in Sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in Sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of Section 112, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in Section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of Article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

APPENDIX NO. 11

REVENUE ACT OF 1934

(48 Stat., C. 277, p. 680, 704-705)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) GENERAL RULE.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under Section 111, shall be recognized, except as hereinafter provided in this section.

(b) EXCHANGES SOLELY IN KIND.—

* * *

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or

securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) SAME—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * *

(g) DEFINITION OF REORGANIZATION.—As used in this section and Section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

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SUPREME COURT OF THE UNITED STATES.

No. 63.—October Term, 1939.

V. L. LeTulle, Petitioner,
vs.
Frank Scofield, United States Collector of Internal Revenue for the First District of Texas.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence.

The Gulf Coast Irrigation Company was the owner of irrigation properties. Petitioner was its sole stockholder. He personally owned certain lands and other irrigation properties. November 4, 1931, the Irrigation Company, the Gulf Coast Water Company, and the petitioner, entered into an agreement which recited that the petitioner owned all of the stock of the Irrigation Company; described the company's properties, and stated that, prior to conveyance to be made pursuant to the contract, the Irrigation Company would be the owner of certain other lands and irrigation properties. These other lands and properties were those which the petitioner individually owned. The contract called for a conveyance of all the properties owned, and to be owned, by the Irrigation Company for $50,000 in cash and $750,000 in bonds of the Water Company, payable serially over the period January 1, 1933, to January 1, 1944. The petitioner joined in this agreement as a guarantor of the title of the Irrigation Company and for the purpose of covenanting that he would not personally enter into the irrigation business within a fixed area during a specified period after the execution of the contract. Three days later, at a special meeting of stockholders of the Irrigation Company, the proposed reorganization was approved, the minutes stating that the taxpayer, "desiring also to reorganize his interest in the properties," had consented to be a party to the re-

organization. The capital stock of the Irrigation Company was increased and thereupon the taxpayer subscribed for the new stock and paid for it by conveyance of his individual properties.

The contract between the two corporations was carried out November 18, with the result that the Water Company became owner of all the properties then owned by the Irrigation Company including the property theretofore owned by the petitioner individually. Subsequently all of its assets, including the bonds received from the Water Company, were distributed to the petitioner. The company was then dissolved. The petitioner and his wife filed a tax return as members of a community in which they reported no gain as a result of the receipt of the liquidating dividend from the Irrigation Company. The latter reported no gain for the taxable year in virtue of its receipt of bonds and cash from the Water Company. The Commissioner of Internal Revenue assessed additional taxes against the community, as individual taxpayers, by reason of the receipt of the liquidating dividend, and against the petitioner as transferee of the Irrigation Company's assets in virtue of the gain realized by the company on the sale of its property. The tax was paid and claims for refund were filed. Petitioner's wife having died he brought suit individually and as her executor and representative in the community property against the respondent to recover the amount of the additional taxes so assessed. He alleged that the transaction constituted a tax-exempt reorganization as defined by the Revenue Act.[1] The respondent traversed the allegations of the complaints and the causes were consolidated and tried by the District Court without a jury. The respondent's contention that the transaction amounted merely to a sale of assets by the petitioner and the Irrigation Company and did not fall within the statutory definition of a tax-free reorganization was overruled by the District Court and judgment was entered for the petitioner.

The respondent appealed, asserting error on the part of the District Court in matters not now material and also assigning as error the court's holding that the transaction constituted a nontaxable reorganization.

The Circuit Court of Appeals concluded that, as the Water Company acquired substantially all the properties of the Irrigation Company, there was a merger of the latter within the literal

[1] Sec. 112(i) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 818.

nguage of the statute, but held that, in the light of the construc-
on this Court has put upon the statute, the transaction would not
a reorganization unless the transferor retained a definite and sub-
antial interest in the affairs of the transferee. It thought this re-
uirement was satisfied by the taking of the bonds of the Water
ompany, and, therefore, agreed with the District Court that a
organization had been consummated. It added, however, "We
nd a reason for reversing the judgment which has not been
gued." Adverting to the fact that the transfer of the petitioner's
dividual properties to the Irrigation Company was for the pur-
se of including them in the latter's assets to be transferred in the
roposed reorganization, the court said the statute did not ex-
nd to the reorganization of an individual's business or affairs,
d the transaction was a reorganization within the meaning of the
evenue Act as respects the corporation's assets owned on Novem-
r 4, 1931, but not as respects the petitioner's individual proper-
s included in the sale. It concluded: "Only so much of the con-
deration as represents the price of the properties and business of
e Irrigation Company is entitled to be protected from taxation as
ising from a reorganization. It does not appear what the proper
portionment is. The burden was upon LeTulle to show not only
at he had been illegally taxed, but how much of what was col-
ted from him was illegal. The latter he did not do. The evi-
nce does not support the judgment for the full amount paid by
m. It is accordingly reversed, that further proceedings may be
d consistent herewith."[2]

The petitioner sought certiorari asserting that the Circuit Court
Appeals had departed from the usual and accepted course of
dicial proceedings by deciding the cause upon a ground not pre-
nted or argued and hence had deprived the petitioner of his day
court. The respondent, though he had contended below that the
ansaction in question did not amount to a tax-free statutory re-
ganization, did not file a cross petition asking for a review of that
rt of the judgment exempting from taxation gain to the Irriga-
on Company arising from the transfer of its assets owned by it
and prior to November 4, 1931, and the part of the liquidating
vidend attributable thereto.

We find it unnecessary to consider petitioner's contention that
e Circuit Court of Appeals erred in deciding the case on a ground
t raised by the pleadings, not before the trial court, not suggested

[2] 103 F. (2d) 20.

or argued in the Circuit Court of Appeals, and one as to which the petitioner had never had the opportunity to present his evidence, since we are of opinion that the transaction did not amount to a reorganization and that, therefore, the petitioner cannot complain, as the judgment must be affirmed on the ground that no tax-free reorganization was effected within the meaning of the statute.

Section 112(i) provides, so far as material:

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation). . . ."

As the court below properly stated, the section is not to be read literally, as denominating the transfer of all the assets of one company for what amounts to a cash consideration given by the other a reorganization. We have held that where the consideration consists of cash and short term notes the transfer does not amount to a reorganization within the true meaning of the statute, but is a sale upon which gain or loss must be reckoned.[3] We have said that the statute was not satisfied unless the transferor retained a substantial stake in the enterprise and such a stake was thought to be retained where a large proportion of the consideration was in common stock of the transferee,[4] or where the transferor took cash and the entire issue of preferred stock of the transferee corporation.[5] And, where the consideration is represented by a substantial proportion of stock, and the balance in bonds, the total consideration received is exempt from tax under Sec. 112(b)(4) and 112(g).[6]

In applying our decision in the *Pinellas* case (*supra*) the courts have generally held that receipt of long term bonds as distinguished from short term notes constitutes the retention of an interest in the purchasing corporation. There has naturally been some difficulty in classifying the securities involved in various cases.[7]

We are of opinion that the term of the obligations is not material. Where the consideration is wholly in the transferee's bonds, or part

[3] Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U. S. 462.

[4] Helvering v. Minnesota Tea Co., 296 U. S. 378.

[5] Helvering v. Nelson, 296 U. S. 374.

[6] 45 Stat. 816, 818. See Helvering v. Watts, 296 U. S. 387.

[7] Worcester Salt Co. v. Commissioner, 75 F. (2d) 251; Lilienthal v. Commissioner, 80 F. (2d) 411, 413; Burnham v. Commissioner, 86 F. (2d) 776; Commissioner v. Kitselman, 89 F. (2d) 458; Commissioner v. Fyand, 98 F. (2d) 201; Commissioner v. Tyng, 106 F. (2d) 55; L. & E. Stirn v. Commissioner (C. C. A. 2), decided Nov. 6, 1939, C. C. H. Vol. 4, 1939, ¶ 9741.

cash and part such bonds, we think it cannot be said that the transferor retains any proprietary interest in the enterprise. On the contrary, he becomes a creditor of the transferee; and we do not think that the fact referred to by the Circuit Court of Appeals, that the bonds were secured solely by the assets transferred and that, upon default, the bondholder would retake only the property sold, changes his status from that of a creditor to one having a proprietary stake, within the purview of the statute.

We conclude that the Circuit Court of Appeals was in error in holding that, as respects any of the property transferred to the Water Company, the transaction was other than a sale or exchange upon which gain or loss must be reckoned in accordance with the provisions of the revenue act dealing with the recognition of gain or loss upon a sale or exchange.

Had the respondent sought and been granted certiorari the petitioner's tax liability would, in the view we have expressed, be substantially increased over the amount found due by the Circuit Court of Appeals. Since the respondent has not drawn into question so much of the judgment as exempts from taxation gain to the Irrigation Company arising from transfer of its assets owned by it on and prior to November 4, 1931, and the part of the liquidating dividend attributable thereto, we cannot afford him relief from that portion of the judgment which was adverse to him.

A respondent or an appellee may urge any matter appearing in the record in support of a judgment,[8] but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him.[9]

The judgment of the Circuit Court of Appeals is affirmed and the cause is remanded to the District Court with directions to proceed in accordance with the opinion and mandate of the Circuit Court of Appeals.

So ordered.

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[8] Langnes v. Green, 282 U. S. 531, 535-537; Helvering v. Gowran, 302 U. S. 238, 245; Ticonic Bank v. Sprague, 303 U. S. 406, 410, Note 3.

[9] The Stephen Morgan, 94 U. S. 599; Mount Pleasant v. Beckwith, 100 U. S. 514, 527; United States v. Blackfeather, 155 U. S. 180, 186; Landram v. Jordan, 203 U. S. 56, 62; Bothwell v. United States, 254 U. S 231, 233; United States v. American Railway Express Co., 265 U. S. 425, 435; Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 191.